STATE OF MICHIGAN

COURT OF APPEALS

FRANS W. JUNGSLAGER and KAREN A. JUNGSLAGER,

Plaintiffs-Appellants,

v

PAUL J. LAMPE, d/b/a LAMPE CONSTRUCTION COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 14, 2006

No. 264441
Ottawa Circuit Court
LC No. 04-050649-CK

Before: Meter, P.J., and Whitbeck, C.J. and Schuette, J.

PER CURIAM.

Plaintiffs claim an appeal from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 1997 plaintiffs entered into a contract for the construction of a home. The outside of the home was finished by one of defendant's subcontractors in a stucco-like exterior insulation finish system (EIFS) that contains a number of coatings, including a base coat, a finish coat, and paint-like top coat. Plaintiffs first occupied the home in February of 1997. Almost immediately, portions of the EIFS finish coating began to crack and peel away from the base coat. Plaintiffs lodged various complaints with defendant, and defendant's agents undertook repairs to the peeling portions of the EIFS coating from 1997 until 2004. The repairs were not successful, and new sections of the stucco continued to peel. Plaintiffs met with defendant, a representative from the company that supplied the EIFS system, and the drywall contractor. However, the parties were apparently unable to resolve the cause of the problem. In August 2004, plaintiffs contacted Auxier Drywall Company, as well as an architect to inspect the stucco. Auxier informed plaintiffs that the entire EIFS system was installed under improper environmental temperatures, which caused portions of the stucco to fail to adhere properly. In addition, Auxier told plaintiffs that the windowsills had been sloped incorrectly, and that the chimney system was improperly installed and had inadequate flashing. This defect was causing water to enter into the sub-roof and rot portions of the chimney system. In October 2004, plaintiffs hired Auxier to repair the damage at an estimated cost of $34,000.

Plaintiffs filed suit against defendant on November 4, 2004, and amended their complaint on December 9, 2004, alleging breach of contract, negligence, gross negligence, and a violation

of the Michigan Consumer Protection Act, MCL 445.901 *et seq*. The complaint alleged that the causes of the damage were not discovered until Auxier inspected the home in the summer of 2004. Defendant moved for summary disposition, alleging that plaintiffs' cause of action was barred by the six-year statute of limitations in MCL 600.5839(1), and that the discovery exception in MCL 600.5839(1) was inapplicable because the nature of the defect was ongoing and continuous.

The trial court granted defendant's motion, holding that the six-year statute of limitations had run and that the discovery clause did not preserve plaintiffs' claim. Furthermore, plaintiffs had failed to establish that defendant was barred from asserting the statute of limitations through promissory estoppel.

We review a trial court's decision on a motion for summary disposition de novo. When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), we accept as true the plaintiff's well-pled allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery. *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

An action against a contractor for damages "arising out of the defective and unsafe condition of an improvement to real property" must be filed within six years "after the time of occupancy of the completed improvement, use, or acceptance of the improvement . . . ." An action may be filed within one year after "the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the . . . damage . . . and is the result of gross negligence on the part of the contractor . . . ." MCL 600.5839(1).

Michigan has adopted the possible cause of action discovery rule. Once a plaintiff has knowledge of the existence of an injury and its possible cause, the plaintiff has knowledge of a cause of action, and the discovery period begins to run. *Gebhardt v O'Rourke*, 444 Mich 535, 545; 510 NW2d 900 (1994). The plaintiff need not know with certainty that a claim exists, or even know of the likely existence of a claim, in order for the discovery period to begin running. *Solowy v Oakwood Hosp*, 454 Mich 214, 222; 561 NW2d 843 (1997). The test to determine when a cause of action has accrued is based on objective facts and not on the subjective beliefs of a particular plaintiff. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 78; 592 NW2d 112 (1999). "Application of the test is a matter of law for the court in the absence of any issue of material fact." *Id*.

The evidence established that the problems occurred almost immediately after plaintiffs took occupancy of the home. Plaintiffs complained to defendant on numerous occasions, and defendant made a number of attempts to repair the stucco. Defendant's repair attempts were unsuccessful, and eventually plaintiffs retained Auxier Drywall and others to inspect the EIFS system and the chimney and to correct the problems. The trial court concluded that plaintiffs were aware of a possible cause of action in that they knew that problems existed with the EIFS system from 1997 and that defendant's numerous attempts to repair the roof had been unsuccessful. The trial court correctly applied the possible cause of action rule and concluded that the discovery period began to run well before the summer of 2004. *Gephardt*, *supra*.

Plaintiffs assert that the discovery period did not begin to run until the summer of 2004 when Auxier Drywall inspected the home and detailed the various causes of the leakage problem

and how this caused the stucco surface to peel. We disagree. Plaintiffs were not required to know the reasons behind the EIFS stucco and related chimney problems in order to know that they had a possible cause of action. *Solowy, supra*. The trial court correctly concluded that because plaintiffs did not file their original complaint until November 2004, the one-year discovery rule in MCL 600.5839(1) was inapplicable, and plaintiffs' claim was time-barred.

In addition, plaintiffs' reliance on the one-year discovery provision would be misplaced even were we to find that discovery occurred at a later date. A plaintiff who wishes to take advantage of this provision must demonstrate gross negligence on the part of the contractor. MCL 600.5839(1). Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Xu v Gay*, 257 Mich App 263, 268-269; 668 NW2d 166 (2003); *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994). Even if plaintiffs could otherwise take advantage of the one-year discovery provision, we conclude that plaintiffs' allegations that defendant failed to properly install the EIFS system, the roof flashing, and the windowsills, and to make repairs constituted allegations of ordinary negligence at most. *Jennings, supra*. Evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).[1]

Plaintiffs also argue that the factual posture of this case strongly supports the application of a promissory estoppel argument to prevent defendant from asserting the statute of limitations. We disagree. Promissory estoppel arises when (1) one party makes a promise, (2) which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person, (3) which does in fact induce such action or forbearance, and (4) in circumstances in which the promise must be enforced in order to avoid injustice. *State Bank of Standish v Curry*, 442 Mich 76, 83; 500 NW2d 104 (1993); *Ypsilanti Twp v General Motors Corp*, 201 Mich App 128, 132-133; 506 NW2d 556 (1993).

However, the sine qua non of the theory of promissory estoppel is that the promise must be actual, clear, and definite. *State Bank of Standish, supra* at 84-85; *Ypsilanti Twp, supra* at 134. Nothing in plaintiffs' materials shows a clear and definite promise to plaintiffs by defendant that he would cure the defect. Plaintiffs' exhibits consist of letters to defendant that repeatedly describe the ongoing problems, possible causes, defendant's attempt to repair the problems, and veiled threats of litigation. Plaintiffs do not, however, present anything showing a specific promise by defendant. Plaintiffs attempt to overcome this lack of evidence by maintaining that defendant implicitly admitted that he promised to repair the problem. However, we agree with the trial court's opinion that plaintiffs have not shown a specific promise that induced them to refrain from litigation.

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[1] The trial court did not specifically decide whether defendant's conduct constituted gross negligence. However, we will normally affirm on alternate grounds when the trial court reaches the right result. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

The trial court also found that estoppel was unavailable here because plaintiffs' forbearance was not reasonable. We agree with the trial court's assessment. It is clear from the lengthy correspondence between the parties that plaintiffs were continuously dissatisfied with defendant's attempt to repair the problem over the years.

Plaintiffs also incorporate an analysis of the doctrine of equitable estoppel in this section of their brief as an alternate argument for relief. They cite to *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263; 562 NW2d 648 (1997), in which our Supreme Court explained the nature of this doctrine:

> In *Lothian v Detroit*, 414 Mich 160, 176; 324 NW2d 9 (1982), this Court emphasized that the doctrine of equitable estoppel is a judicially created exception to the general rule that statutes of limitation run without interruption. It is essentially a doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the defendant from raising the statute of limitations as a bar.
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> One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. This Court has been reluctant to recognize an estoppel absent intentional or negligent conduct designed to induce a plaintiff to refrain from bringing a timely action. *Id*. at 177. Negotiations intended to forestall bringing an action have been considered an inducement sufficient to invoke the doctrine, however. *Friedberg v Ins Co of North Americ*a, 257 Mich 291; 241 NW183 (1932). [*Cincinnati Ins Co, supra* at 270.]

Like the doctrine of promissory estoppel, the doctrine of equitable estoppel requires reasonable or justifiable reliance. *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998).

Here, plaintiffs have not pointed to a material misrepresentation of fact on the part of defendant on which they relied. Their exhibits show that defendant attempted to repair the defective conditions. However, plaintiffs have not shown that defendant concealed their cause of action, misrepresented the applicable period of limitation, or otherwise attempted to dissuade them from commencing action at an earlier time. See *id*. Defendant was under no obligation to invite plaintiffs to sue. We thus find the trial court's grant of summary disposition appropriate.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette